THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

GTI Spindle Technology, Inc.

v.

David Bukowitz, Paul Berberian, & Jose Flores

Docket No. 216-2021-CV-00248

ORDER

Plaintiff brought this action against Defendants seeking damages and injunctive relief based on Defendants' alleged breach of nondisclosure agreements and tortious conduct during and subsequent to their employment relationships with Plaintiff. Defendants now move for summary judgment on four of Plaintiff's counts, to which Plaintiff objects. The Court held a hearing on October 18, 2022. For the reasons that follow, Defendants' motion is DENIED.

Factual Background

The Court draws the following facts, which are uncontested unless otherwise specified, from the parties' joint statement of material facts ("SOMF") and exhibits attached to pleadings. While the parties agree on some facts, especially pertaining to how, when, and why Plaintiff hired Defendants, they agree on few of the facts regarding whether Plaintiff kept relevant information confidential. The Court begins the factual background by discussing the parties' history before turning to Plaintiff's procedures for maintaining confidentiality.

(A) History of the Parties' Relationships

Plaintiff is a New Hampshire for-profit corporation that repairs spindles, which are the rotary units within machine tools. More specifically, Plaintiff manufactures, repairs, and replaces spindles, and performs predictive spindle maintenance. (SOMF at ¶¶ 87−88.) One of the predictive maintenance techniques Plaintiff employs is vibration analysis, which involves the use of electronic sensors called accelerometers to measure the forces acting on a rotating machine. (*Id*. ¶ 89.)

In or around 2010, Plaintiff's president, Tom Hoenig, became interested in finding a method to use an accelerometer connected to an iPad via a data acquisition box to collect and analyze data and display the data in an iPad application. (*Id*. ¶ 90.) In 2011, Plaintiff formed the GTI Predictive Technology division to develop this project. (*Id*. ¶ 93.) At the time, none of Plaintiff's employees had the necessary software development background. Accordingly, Plaintiff contracted with mechanical engineer David Bukowitz, and his then-company, Motionics, LLC ("Motionics"), which worked in the field of vibration analysis. (Pl.'s Surreply Defs.' Reply Obj. Mot. Dismiss, Ex. 1.) Plaintiff hired Mr. Bukowitz as an employee in 2013. (SOMF at ¶ 101.) On January 14, 2014, Plaintiff hired Paul Berberian as Vice President of Sales and Marketing. (*Id*. ¶ 102.) Plaintiff hired mechanical engineer Jose Flores in 2017. Mr. Flores had previously worked at a company he founded, Predictive Maintenance Solutions, LLC ("PdMS"), which was one of Plaintiff's vendors. (*Id*. ¶ 103.)

When he still worked for Motionics, Mr. Bukowitz signed an NDA with Plaintiff. (*Id*. ¶ 97.) He executed a new NDA on March 15, 2013, after Plaintiff hired him. (*Id*. ¶ 101.) Mr. Berberian signed an NDA on January 2, 2014, the same day he was hired.

(*Id*. ¶ 102.) Mr. Flores signed an NDA on August 29, 2017, which was some number of months after he was hired. (*Id*. ¶ 104.) The NDAs are identical except for Defendants' names. Plaintiff did not sign any of the NDAs. (Compl., Exs. 1−3.) These agreements prohibit signatories from directly and indirectly disclosing or transferring any of Plaintiff's confidential information, and from using it for any purpose except in the course of the signatories' work for Plaintiff. (*See id*., Ex. 1 at 2.) The NDAs define confidential information as "information or material proprietary to GTI or designed as 'Confidential Information' by GTI and not generally known by non-GTI personnel, of which the undersigned may obtain knowledge or access as a result of the undersigned's relationship with GTI . . . ." (*Id*., Ex. 1 at 1.) The agreements also provide examples of what constitutes confidential information, including "software in various states of development . . . [and] customer names and other information related to customers." (*Id*.)

The NDAs appear to have been adopted from a Connecticut-based company, GTI Technologies, Inc. (*See* Mot. Summ. J., Ex. AH.) Under the computer and software policy section (the "Policy Section"), the NDAs specify that "[i]t will be considered a break of company policy, and in some cases may be illegal, for GTI personnel to develop software for end users of competitive equipment that utilizes software / applications techniques considered proprietary to GTI." (Compl., Ex. 1 at 3.) However, some of the work listed in the Policy Section is beyond the scope of Plaintiff's work; specifically, "machine control and workpiece programs" and "grinding concepts". (*Id*.)

The parties worked on developing a number of products. However, relationships eventually broke down. Mr. Berberian resigned on September 25, 2019, but agreed to continue to work for Plaintiff, either for another month, as Defendants assert, or until the end of the year, as Plaintiff contends. (SOMF at ¶ 116.) On September 26, 2019, Plaintiff began monitoring Mr. Berberian's email and discovered that he had asked Mr. Flores to provide a quote for a job to one of Plaintiff's customers who had already been provided with a quote. Mr. Berberian admitted to Plaintiff that he had quoted the job in private so that he could be paid the entire value. Plaintiff terminated him for cause. (*Id*. ¶ 117.) Mr. Flores resigned on July 28, 2020. (*Id*. ¶ 121.)

Mr. Bukowitz, while still employed by Plaintiff, began developing software for one of Plaintiff's clients without notifying Plaintiff. (*Id*. ¶ 142.) He tendered his resignation on July 31, 2020. At this point, he had control over source code needed for one of Plaintiff's products. In order to be able to use the source code, Plaintiff paid Mr. Bukowitz $100,000 for a perpetual license (the "License"). (*Id*. ¶¶ 133−34.)

After their respective terminations or resignations, Mr. Flores became PdMS's Chief Operating Officer, Mr. Bukowitz its Chief Technology Officer, and Mr. Berberian its sales consultant. Plaintiff contends that PdMS began marketing itself as SensOS after Mr. Flores resigned, which Defendants dispute. (*Id*. ¶ 135.) It is, however, undisputed that Mr. Bukowitz assigned his rights under the License to SensOS, and Mr. Flores has worked for SensOS at some point. (Jose Flores Aff. ¶ 2.) It is also undisputed that SensOS directly competes with Plaintiff, as its products are functionally and stylistically identical to Plaintiff's products. (SOMF ¶ 138.) SensOS began marketing its products only a few months after Mr. Flores and Mr. Bukowitz left Plaintiff's employ. (*Id*.

¶¶ 136−40.) SensOS's products have included improvements Mr. Hoenig suggested Mr. Bukowitz employ when he still worked for Plaintiff, but that Mr. Bukowitz had rejected as unnecessary. (*Id*. ¶ 144.) While still employed by Plaintiff, Mr. Berberian gained access to Plaintiff's customer database after Plaintiff agreed to let him make improvements to it. Mr. Berberian apparently still has access to this database. (*Id*. ¶ 115.) SensOS is now working with Plaintiff's vendors and customers, which SensOS is seeking to move to SensOS products. (*Id*. ¶¶ 144−45.)

(B) Nondisclosure and Confidentiality

At issue in this Order is whether there are questions of fact regarding whether Defendants signed valid, enforceable NDAs that they violated by misappropriating Plaintiff's intellectual property. The parties disagree over many of the facts relevant to these issues, especially pertaining to what steps Plaintiff took to maintain the secrecy of what it claims is confidential information. Plaintiff asserts that "[a]ll employees, vendors, resellers, and any other person or entity who could come into contact with confidential information signed an NDA." (*Id*. ¶ 107.) Defendants claim that not all vendors signed an NDA. For example, they claim there was no NDA with PdMS prior to when Plaintiff hired Mr. Flores. (*Id*.)

Plaintiff also contends that it took various steps to limit access to confidential information to only those in need of such access. (*Id*.) For example, Plaintiff asserts that after the company transitioned to a cloud-based system, employees were required to use a specific portal that was only accessible to specific employees needing access and was username- and password-protected. Plaintiff claims that its IT vendor provided training to employees on how to use the new system. (*Id*. ¶ 111; Tracy Hoenig Aff., Ex.

2.) For their part, Defendants claim they were not provided with the IT training. (SOMF at ¶¶ 111−12.) They claim that some company documents and files were accessible without a password, such as the customer database, and that company files lacked notations that they were confidential. (*Id*.) Defendants contend that many employees used personal devices in the absence of a policy governing such use. (*Id*. ¶ 105.)

Analysis

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 756 (2006). The moving party bears the burden of proving its entitlement to summary judgment. *See Concord Grp. Ins. Cos. v. Sleeper*, 135 N.H. 67, 69 (1991). In evaluating a motion for summary judgment, the Court considers "the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Id*.

Defendants now argue that (1) Plaintiff has failed to adduce sufficient evidence to show that it took reasonable steps to maintain the secrecy of what it claims is confidential; (2) the NDAs are unenforceable; (3) Plaintiff's breach of fiduciary duty claim (Count IV) is statutorily preempted; and (4) Plaintiff's Consumer Protection Act ("CPA") claim (Count IV) is conclusory. The Court will address each argument in turn.

1. Plaintiff's Steps to Maintain Secrecy (Counts I, III, and IV)

Plaintiff contends that Defendants misappropriated its trade secrets in violation of RSA chapter 350-B by, *inter alia*, using Plaintiff's trade secrets to develop their own competing technology and using Plaintiff's customer information (Count I); converted Plaintiff's confidential information (Count III); and breached their fiduciary duties by disclosing Plaintiff's trade secrets and confidential information to compete with Plaintiff (Count IV). (*See generally* Compl.) Defendants now claim that they are entitled to summary judgment on these counts because Plaintiff failed to take reasonable steps to maintain the secrecy of the alleged trade secrets and confidential information. (Mot. Summ. J. at ¶ 2.) Plaintiff replies that the adequacy of the measures it took to preserve secrecy is a question of fact, and that Plaintiff undertook numerous measures to protect secrecy. (Obj. Mot. Summ. J. at 12−13.)

In support of their respective arguments on the reasonableness of Plaintiff's efforts to maintain secrecy, the parties point to different facts, some of which they dispute. For example, Defendants state that they did not need passwords to access some accounts and that not all employees needed to sign NDAs, (Mot. Summ. J. ¶ 2), while Plaintiff states it required NDAs of all employees, vendors, and resellers, and used a secure portal to provide access to its programs, (Obj. Mot. Summ. J. at 15.)

New Hampshire's Uniform Trade Secret Act ("NHUTSA"), RSA chapter 350-B, does not specify what protective measures are required to maintain trade secrets, but provides that a trade secret must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RSA 350-B:1, IV. Although the New Hampshire supreme court has not specifically addressed the issue, courts in other jurisdictions that apply analogous NHUTSA provisions have reasoned that whether adequate steps at maintaining secrecy were taken is a highly fact-specific inquiry generally inappropriate for summary judgment. *See e.g., Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) ("But only in an extreme case can what is a 'reasonable' precaution be determined on a motion for summary judgment, because the answer depends on a balancing of costs and benefits that will vary from case to case . . . ."); *Genworth Financial Wealth Management, Inc. v. McMullan*, No. 3:09–CV–1521(JCH), 2012 WL 1078011, at *8 (D. Conn. March 8, 2012) ("The question of whether, in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry."); *Giasson Aerospace Science, Inc. v. RCO Engineering, Inc.*, 680 F. Supp. 2d 830, 840 (E.D. Mich. 2010) (same); *see also Spottiswood v. Levine*, 730 A.2d 166, 174−75 n.7 (Me. 1999) (listing factors a court may use to determine whether efforts to maintain secrecy were reasonable including the nature and extent of measures taken to guard the information's secrecy, and whether there was a nondisclosure agreement).

As indicated above, the parties dispute the nature and extent of the measures Plaintiff took to guard the secrecy of its information. They not only disagree as to whether the steps Plaintiff took to maintain secrecy were reasonable, but even dispute, in some cases, whether Plaintiff took those steps in the first place. For example, Plaintiff claims it required NDAs of all employees and vendors, while Defendants dispute this and claim Mr. Flores' previous company never signed an NDA when it was one of Plaintiff's vendors. (*See* SOMF at ¶ 107.) Similarly, Plaintiff asserts that its IT vendor trained all employees on how to use its username- and password-protected portal, to which Defendants reply they never received such training. (*See id*. at ¶¶ 111−12.) Accordingly, and consistent with the above-cited case law, the Court concludes that there remains a triable issue of fact militating against granting summary judgment on Plaintiff's claims of misappropriation, breach of fiduciary duties, and conversion. *See Editions Play Bac, S.A. v. Western Publ'g Co.*, No. 92 Civ. 3652 (JSM), 1993 U.S. Dist. LEXIS 18241, at *22−23 (S.D.N.Y. Dec. 22, 1993) (finding court need not address arguments regarding whether information was misappropriated trade secret because there was a question of material fact as to plaintiff's efforts to maintain secrecy of that information, as required to determine if it was eligible for trade secret protection in the first place); *Panterra Eng'd Plastics, Inc. v. Transp. Sys. Sols., LLC*, 539 F. Supp. 2d 600, 604 (D. Conn. 2008) (denying summary judgment on breach of fiduciary duty claim where genuine factual issue existed as to whether defendants misappropriated plaintiff's trade secrets); *Pacific & Atl. Shippers v. Schier*, 109 N.H. 551, 554 (1969) ("The gist of the action of conversion is the proof of <u>wrongful</u> deprivation of property to one entitled to possession." (emphasis added)).

Summary judgment as to Counts I, III, and VI based on the reasonableness of Plaintiff's efforts to maintain secrecy is DENIED. *See* RSA 491:8-a, III.

2. Whether NDAs are Enforceable (Count II)

In Count II, Plaintiff asserts that Defendants breached their NDAs by, among other things, using Plaintiff's confidential information without Plaintiff's consent and developing software for Plaintiff's customers without Plaintiff's knowledge. (Compl. at ¶¶ 116−19.) Defendants claim they are entitled to summary judgment as to Count II because the NDAs are not enforceable. In support, they put forth a slew of arguments, (Mot. Summ. J. at ¶¶ 40−62), all of which Plaintiff disputes, (Obj. Mot. Summ. J. at 20−23). The Court will address each argument in turn.

(A) Whether NDAs are Unreasonable Under Three-Prong Noncompete Test

Defendants first contend that the NDAs are unenforceable because they are unreasonable under a three-prong balancing test used to interpret covenants not to compete. (Mot. Summ. J. ¶¶ 44−48 (citing *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 155 N.H. 381, 389 (2007)).) Plaintiff replies that *ACAS Acquisitions* does not mandate nondisclosure agreements be analyzed under the three-prong test, but even if it did, Defendants would not be entitled to summary judgment. (Obj. Mot. Summ. J. at 20−21.)

In *ACAS Acquisitions*, the supreme court considered the validity of a noncompete agreement defendant had signed with his employer that prohibited him from working for a competitor for 24 months following termination of his employment. To determine the validity of the agreement, the supreme court examined whether the agreement (1) was narrowly tailored to protect ACAS's legitimate interest; (2) imposed an undue hardship on defendant; and (3) was injurious to the public interest. The court concluded that the agreement was reasonable and valid under this test. *Id*. at 395. The court then used the three-prong test to interpret defendant's nondisclosure agreement, which prohibited defendant from revealing the trade secrets and confidential information of ACAS or any third party whose confidential information ACAS was under an obligation to keep confidential, except as may be required in the performance of defendant's duties. *Id*. at 396−97. The court found the nondisclosure agreement was reasonable and valid because it only prohibited defendant from disclosing information that belonged to ACAS and that concerned the conduct of its business, did not apply to information in the public domain or that otherwise did not belong to ACAS, and because the information at issue was specifically defined in the agreement. *Id*. at 396−97.

As Plaintiff argues, *ACAS Acquisitions* does not require the Court to apply the three-pong test in the analysis of the NDAs because the *ACAS Acquisitions* court explicitly stated it was assuming the test applied solely for the purposes of that opinion. 155 N.H. at 395−96. The Court is not persuaded this standard applies generally to nondisclosure agreements because these agreements have markedly different consequences for employees as compared to noncompete agreements. Noncompete agreements may materially limit employees' ability to work in the same industry, while nondisclosure agreements only prohibit employees from misappropriating employers' confidential information. It strikes the Court as unreasonable for an employee to claim that not being able to disclose his employer's confidential information is an unenforceable restriction on employment. *See Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 647 (Tex. 1994) (noting that nondisclosure agreements do not prohibit employees from using their general knowledge and skill against employer, but only prohibit disclosure of employer's confidential information; as a result, covenants not to compete are against public policy unless they are reasonable, but nondisclosure covenants are not against public policy); *Advanced Magnification Instruments of Oneonta, N.Y., Ltd. V. Minuteman Optical Corp.*, 135 A.D.2d 889, 891 (N.Y. App. Div. 1987) (stating that employee's right to compete with former employer is protected, but employee may not unlawfully seize employer's property such as customer information that cannot easily be obtained elsewhere and which employer put considerable work into creating as this would be "patently unfair"). For these reasons, the Court does not believe that the three-prong standard articulated in *ACAS Acquisitions* is appropriate for interpreting nondisclosure agreements.

However, even if the test did apply, Defendants still would not prevail. Like the nondisclosure agreement that the *ACAS Acquisitions* court found was reasonable, the NDAs in question only provide that Defendants may not disclose Plaintiff's confidential information. Additionally, like in *ACAS Acquisitions*, confidential information is explicitly delineated in the NDAs and does not include information in the public domain or that otherwise is not subject to confidentiality restrictions. *See id*. at 396; (Compl., Ex. 1 at 1). Accordingly, as in *ACAS Acquisitions*, the Court would not find as a matter of law that the NDAs are unreasonable. 155 N.H. at 397.

Defendants also argue that they were not presented with the NDAs until after they were hired and that, under *Merrimack Valley Wood Prod., Inc. v. Near*, 152 N.H. 192 (2005), which applies the same three-prong test as *ACAS Acquisitions*, this can constitute evidence of bad faith. (*See* Mot. Summ. J. at ¶ 42). However, the *Merrimack* court performed this analysis in the context of whether a covenant not to compete could be reformed, and only after deciding that the covenant was unreasonable under the three-prong test. *See Merrimack,* 152 N.H. at 200. Having decided that the NDAs are not unreasonable, the Court need not determine whether not providing Defendants with the NDAs prior to hiring them shows bad faith on the part of Plaintiff. Further, in *Merrimack*, the agreement not to compete showed bad faith and could not be reformed because it was not discussed during the job interview, the employer did not present it to the employee until six months after hiring, and the employee was told his ability to retain his position was contingent on signing. *See id*. Defendants make no such allegations.

In sum, the NDAs are not unreasonable as a matter of law. Therefore, Defendants are not entitled to summary judgment. *See* RSA 491:8-a, III.

(B) Whether NDAs Apply to Plaintiff and Plaintiff's Work

Defendants next contend that the NDAs are invalid and unenforceable because (1) the "GTI" referred to throughout the agreements is GTI Technologies, Inc., an entity separate from Plaintiff; (2) the work listed in the Policy Section goes beyond Plaintiff's scope of work; and (3) the NDAs do not explicitly reference trade secrets. (Mot. Summ. J. at ¶¶ 49−51.) Plaintiff concedes it obtained the template agreement from GTI Technologies, Inc. However, Plaintiff asserts the inclusion of terms from the old template agreement was merely a scrivener's error, and there is no question that Defendants understood they were contracting with Plaintiff. Plaintiff also asserts that Defendants cite to no authority showing that the term "trade secret" had to be expressly used. (Obj. Mot. Summ. J. at 21−22.)

Under New Hampshire law, "offer, acceptance, and consideration are essential to a contract's formation." *Tsiatsios v. Tsiatsios*, 140 N.H. 173, 178 (1993). "A party may accept a contract by performance or conduct." *Kalled v. Albee*, 142 N.H. 747, 749 (1998). Interpretation of a contract is a question of law. *Behrens v. S.P. Construction Co., Inc.*, 153 N.H. 498, 500 (2006). "When interpreting a written agreement, [the Court] give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." *Czumak v. N.H. Div. of Developmental Servs.*, 155 N.H. 368, 373 (2007). Generally, the plain language of the contract determines the parties' intent, unless the language is ambiguous or there is a contrary meaning intended by the parties. *Id*. If the plain language is ambiguous, courts may consider extrinsic evidence. *Behrens*, 153 N.H. at 500.

Here, Defendants do not contend that offer, acceptance, or consideration were lacking with respect to the NDAs. Instead, they assert, in essence, that the agreements are technically invalid because Plaintiff adopted them from another company and failed to sufficiently tailor the scope of work as described in the Policy Section. The Court finds that this argument is without merit. First, the agreements do not repeatedly refer to GTI Technologies, Inc. The Court found one reference to the full name in the Policy Section. Otherwise, the agreements refer to "GTI" which is also Plaintiff's name. While the Policy Section does mention some types of work that are beyond the scope of Plaintiff's business, it also lists types of work that are within the scope and certainly are applicable to Defendants; for example, software and applications. (Compl., Ex. 1 at 3.)

The fact that the NDAs contain some errors does not render them invalid or unenforceable as a matter of law because there is at least a question of fact as to whether these errors affected the NDAs or were mere scrivener's errors. *See Bort v. Parker*, 42 P.3d 980, 990 (Wash. Ct. App. 2002) (denying summary judgment because there was a question of material fact as to whether contract contained scrivener's error or error affected the contract).

There is no indication of confusion as to which GTI was party to the NDAs. Such a claim would strain credulity because of the overwhelming evidence of the employer-employee relationship between Plaintiff and Defendants, and the lack of any suggestion of such a relationship between Defendants and GTI Technologies, Inc. The Court reaches the same conclusion with respect to references in the NDAs to work Plaintiff does not perform, because there is no indication Defendants believed the NDAs did not apply to their work. *See id*. (denying summary judgment where evidence indicated the parties intended to contract with each other, despite reference in the contract to the wrong party name, because movant's interpretation would require the court to ignore other evidence in the contract and the contract's objectives).

Lastly, it is unclear how the lack of explicit reference to trade secrets would render the NDAs unenforceable, as Defendants offer no such explanation.[1] At the very least, there is a genuine question of fact as to whether the NDAs are valid and enforceable, given the errors Defendants invoke. Such a question is material because if the NDAs are invalid and unenforceable, Plaintiff cannot succeed on its breach of contract claim. *See Provencal v. Vt. Mut. Ins. Co.*, 132 N.H. 742, 745 (1990) (noting that the existence of a valid agreement between the parties is essential to show breach of contract).

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[1] To the extent Defendants invoke this absence as a way to argue that they were free to disclose Plaintiff's trade secrets, the Court disagrees. There is no indication Defendants did not believe the NDAs covered trade secrets such that they were free to disclose them. In fact, the only reasonable interpretation of the NDAs was that they protected trade secrets. There is significant overlap in the language used in the NDAs' definition of confidential information and the definition of trade secret under RSA 350-B:1, IV. *Compare id*. (defining trade secret as "<u>information</u> including a . . . <u>technique</u>, or <u>process</u>, that "[d]erives independent economic value . . . from <u>not being generally known</u> . . . [or] readily ascertainable by proper means" and that "[i]s the subject of efforts that are <u>reasonable under the circumstances to maintain its secrecy</u>" (emphasis added)); *with* (Compl., Ex. 1 at 1 (stating that confidential information includes, relevant here, "information . . . not generally known by non-GTI personnel" that Plaintiff treats as proprietary or confidential and includes "techniques" and "processes")). The Court also can discern no reason why the parties would have intended to execute a nondisclosure agreement that protected confidential information excluding trade secrets, as this would have been nonsensical. *See Czumak*, 155 N.H. at 373 ("When interpreting a written agreement, [the Court] give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole.").

(C) NDA Signatures

Defendants next claim that the NDAs are unenforceable because only Defendants signed them. (Mot. Summ. J. at ¶ 15.) Plaintiff replies that Defendants cite to no authority in support of their contention that Plaintiff was required to sign the NDAs. (Obj. Mot. Summ. J. at 20−23.)

There is ample authority holding that various types of agreements need only be signed by the party to be charged. *See, e.g., Serafin v. Balco Prop. Ltd., LLC*, 185 Cal.Rptr.3d 151, 159 (Ct. App. 2015) (finding arbitration agreement "can be specifically enforced against the signing party regardless of whether the party seeking enforcement has also signed, provided that the party seeking enforcement has performed or offered to do so"); *Ullsperger v. Meyer*, 75 N.E. 482, 485 (Ill. 1905) ("[T]he agreement need not be signed by both parties, but only by him who is to be charged by it. And he is estopped from denying the execution of the instrument on the ground that it wants the signature of the other party."); *Goetz v. Hubbell*, 266 N.W. 836, 838 (N.D. 1936) (finding statute of frauds satisfied when memorandum evidencing sale of real property was signed by the party to be charged, and which need not have been signed by the other party). The above-cited principles apply with even more force to nondisclosure agreements because these agreements relate solely to employee responsibilities with respect to the employer's information, rather than specifying both parties' obligations. In light of these holdings, the absence of authority showing nondisclosure agreements need to be signed by both parties, and because Defendants do not provide analysis as to why Plaintiff's failure to sign the NDAs renders them unenforceable, Defendants are not entitled to summary judgment based on this argument.

In sum, Defendants are not entitled to summary judgment as to Plaintiff's breach of contract claim based on their argument that, as a matter of law, the NDAs are unenforceable. *See* RSA 491:8-a, III. Summary judgment as to Count II is DENIED.

(3) Breach of Fiduciary Duty as to Confidential Information (Count IV)

In Count IV of its complaint, Plaintiff claims that Defendants breached their duty of loyalty to maintain the confidential information entrusted to them by, for example, using and disclosing Plaintiff's trade secrets and confidential information, and by unfairly competing with Plaintiff while still employed by Plaintiff. (Compl. at ¶¶ 124−27.) Defendants claim they are entitled to summary judgment on this count because the NHUTSA preempts it. They suggest that Plaintiff is only asserting a tort cause of action grounded in allegations of misappropriation of trade secrets. (Mot. Summ. J. at ¶ 38.) Plaintiff replies that Defendants fail to articulate how preemption is applicable to this count, and that the evidence shows Defendants' breaches of fiduciary duties extend far beyond mere misappropriation of trade secrets. (Obj. Mot. Summ. J. at 18−20.)

The NHUTSA "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." RSA 350-B:7, I. "The purpose of the preemption provision is to preserve a single tort action under state law for misappropriation of information that may not meet the statutory standard for a trade secret." *Mortg. Specialists, Inc.*, 153 N.H. at 776. "Whether a particular claim is preempted by the NHUTSA turns on whether the claim conflicts with the NHUTSA." *Id*. at 778. To determine whether a claim conflicts with the NHUTSA, the Court looks to the facts alleged. *Id*. A claim is preempted if the allegations are based solely on the misuse of information. *Id*. However, "a claim is not preempted where the elements of the claim require some allegation or factual showing in addition to that which forms the basis for a claim of misappropriation of a trade secret." *Id*. at 778–79. Thus, "to determine whether a plaintiff's claims are preempted by the NHUTSA, a court must examine the facts alleged in support of each claim to determine the extent to which the claim is based upon the misappropriation of trade secrets or other information." *Id*. at 780.

The Court finds that Defendants are not entitled to summary judgment as to Count IV based on their argument that the NHUTSA preempts it. While Plaintiff asserts that Defendants misappropriated trade secrets in Count I, Plaintiff claims that Defendants did more than just this. In Count IV, Plaintiff also claims Defendants used unfair and deceptive acts to compete while still employed by Plaintiff. (*See* Compl. at ¶ 126.) This claim is supported by numerous undisputed facts. For example, while still employed by Plaintiff, Defendants represented to Mr. Hoenig that certain technology would not be useful in Plaintiff's products, which Defendants thereafter employed in its own products. Defendants retained Plaintiff's customer database, and provided Plaintiff's customers with separate quotes. Since their employment with Plaintiff ended, Defendants have been involved with a company that creates products that are functionally and stylistically identical to Plaintiff's products. This company has been courting Plaintiff's vendors and customers. (*See* SOMF at ¶¶ 117, 136−145.) Accordingly, Count IV does more than just allege misappropriation of trade secrets, and thus is not preempted. *See Office Depot, Inc. v. Impact Office Prod.*, LLC, 821 F. Supp. 2d 912, 923 (N.D. Ohio 2011) (finding that claim alleging breach of duty of loyalty was not preempted to the extent plaintiff claimed defendants intercepted, converted, or redirected plaintiff's customers, as this provided an independent factual basis not solely dependent on plaintiff's UTSA claim); *Mortg. Specialists, Inc.*, 153 N.H. at 778.

Consistent with the foregoing, Defendants' motion for summary judgment as to Count IV based on preemption is DENIED. *See* RSA 491:8-a, III.

4. Consumer Protection Act (Count VI)

Finally, in Count VI, Plaintiff alleges that Defendants violated RSA chapter 358-A through their conduct with respect to the trade secrets and confidential information, as described above. (Compl. at ¶¶ 133−36.) Defendants contend that they are entitled to summary judgment on this count because Plaintiff has at most asserted an ordinary breach of contract claim, which cannot constitute a violation of the CPA. (Mot. Summ. J. at ¶¶ 63−67.) Plaintiff replies that the sufficiency of the factual allegations is irrelevant for the purposes of deciding summary judgment, and that Defendants have failed to show there is no dispute of material fact as to this count. Moreover, Plaintiff asserts it has adduced sufficient facts to show there is at least a dispute as to whether Defendants' conduct rises to the level of rascality required to show they violated the CPA. (Obj. Mot. Summ. J. at 23−24.)

The CPA makes it "unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." RSA 358-A:2; *see also Fat Bullies Farm, LLC v. Devenport*, 170 N.H. 17, 24 (2017). RSA 358-A:2 enumerates specific categories of conduct that constitute unfair and deceptive trade practices, including passing off goods or services as those of another, and causing likelihood of confusion as to the source or affiliation of goods or services. Commercial conduct not falling within the enumerated list may still violate the CPA if it meets the "rascality test," meaning if "the objectionable conduct . . . attain[s] a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Fat Bullies Farm*, 170 N.H. at 24. "[N]ot all conduct in the course of trade or commerce falls within this scope." *Id*. Importantly, an "ordinary breach of contract claim does not violate the CPA." *State v. Moran*, 151 N.H. 450, 453 (2004).

As outlined in Count VI of its Complaint, Plaintiff reasserts all of the preceding paragraphs, and claims that Defendants' actions, as described in those preceding paragraphs, violated the CPA. (Compl. at ¶¶ 133−34.) Essentially, Plaintiff asserts that the CPA claim stands on the shoulders of Plaintiff's preceding claims which include conversion of trade secrets and breach of fiduciary duties of loyalty. Plaintiff's CPA claim thus clearly goes beyond mere breach of contract. *See Trent Partners & Assoc., Inc. v. Digital Equip.*, 120 F. Supp. 2d 84, 106−07 (D. Mass. 1999) (denying summary judgment on CPA claim because there existed a triable issue of fact as to whether defendants' conduct breached implied covenant of good faith and fair dealing in at-will employment contracts based on an element of bad faith and improper motive or breach of fair dealing rising to the level of rascality); *Mortg. Specialists, Inc.*, 153 N.H. at 777 (finding CPA claim survived because it was based on alleged misrepresentation by defendants to plaintiff's customers that plaintiff was not properly licensed in the state).

Consistent with the foregoing analysis, because there remains a factual dispute as to whether Defendants' actions rose to the level of rascality, Defendants' motion for summary judgment is DENIED as to Count VI. *See* RSA 491:8-a, III.

Conclusion

For the preceding reasons, Defendants' motion for summary judgment as to Plaintiff's Counts I, II, III, IV, and VI is DENIED.

SO ORDERED.

November 7, 2022
Date

Judge David A. Anderson